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Supreme Court of the United States

OCTOBER TERM, 1960.

No. 752.

JOACHIM RIBEIRO,

Petitioner,

against

UNITED FRUIT COMPANY, a New Jersey Corporation, Defendant and ESSO STANDARD OIL COMPANY, a Delaware Corporation,

Respondent,

and

UNITED FRUIT COMPANY, a New Jersey Corporation,

Third-Party Defendant.

BRIEF OF RESPONDENT ESSO STANDARD OIL COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI AND ADDENDUM.

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and

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BRIEF OF RESPONDENT ESSO STANDARD OIL COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

Plaintiff below petitions for a review of an order of the United States Court of Appeals for the Second Circuit (November 21, 1960) affirming a judgment of dismissal filed December 15, 1959, entered on a jury verdict on special findings after a trial before District Judge Alexander Bicks.

Petitioner was a watchman employed by Piership Protective Association and assigned to the SS. *Parisminia* which was owned by United Fruit Company. Petitioner

claimed injuries suffered while returning to the SS. *Parisminia* from the Esso Barge #23 which was moored alongside the SS. *Parisminia*. Petitioner had no business on the barge and, as the jury found, was a trespasser thereon. (Pet.'s App. 49) The Esso Barge #23, which was to bunker the SS. *Parisminia*, was owned and operated by respondent, Esso Standard Oil Company, hereafter referred to as Esso or respondent.

Petitioner discontinued his suit against defendant United Fruit Company at the conclusion of his case in the trial court. Therefore, United Fruit Company, although named as a respondent, is not concerned with this petition.

The opinion of the Court of Appeals, reported at 284 F. 2d 317, after considering every point raised by petitioner below, unanimously affirmed the judgment.

In the Court of Appeals, petitioner alleged errors as to matters to which he had consented on the trial and also as to charges to the jury to which he did not take appropriate exception. He is barred from now asserting them. (F. R. C. P. 51)

The jury found that (1) petitioner had not been invited on the barge; (2) the bargee was without authority to invite him; (3) petitioner boarded the barge for purposes inimical to the legitimate interests of respondent. (Pet.'s App. 49) Thus what the petitioner really seeks is to have this Court review issues of fact already determined by a jury.

Throughout petitioner's brief, statements are made with respect to matters which he says took place on the trial but nowhere does he document them. He has not even furnished a transcript of the record which was before the Court of Appeals.

The Court of Appeals justifiably criticized counsel for both parties for failing to present adequate appendices to

their respective briefs. In order that this Court has before it record references to the relevant portions of the transcript of the record, respondent has annexed to its brief an Addendum in which the Court will find adequate support for the fact statements made by respondent.

This Court has the right to infer from petitioner's failure to document his charges of error, that the record does not support the charges and this Court can justifiably ignore them. No attempt will be made in respondent's brief to indicate the petitioner's erroneous statements *seriatim* because it would unduly extend respondent's brief. It is thought sufficient to deal with them in the counter statement of facts and the argument where controversial facts will be noted.

Character of the Litigation.

This is a non-statutory action for negligence based on diversity of citizenship against the barge owner, Esso Standard Oil Company. The action is for damages for alleged personal injuries sustained by petitioner, a watchman, when he allegedly fell while ascending a ladder from respondent's barge to the SS. *Parisminia*, which petitioner had left a short time before in violation of his watchman's duties.

Jurisdiction.

Petitioner invokes the jurisdiction of this Court on the grounds that (1) the rulings of the Trial Court and the Court below were substantially prejudicial to petitioner's rights and (2) there is a conflict of opinion between various Courts of Appeal as to the construction and application of Rules 49 and 51 of the Federal Rules of Civil Procedure. The alleged conflict is not illustrated in petitioner's brief.

There is no conflict of opinion among the Courts of Appeal as to the meaning and construction of either rule 49 or 51 of the Federal Rules of Civil Procedure. The review now sought actually concerns only issues of fact of which the jury was the sole judge. There were not any errors of law.

Counter Statement of the Facts.

Petitioner, by day, was employed as a maintenance man by the Transit Authority of the City of New York. At night, he worked for Piership Protective Association as a watchman. The latter assigned him to duty on the SS. *Parisminia* which was docked at Pier 7 North River. Here he was under the jurisdiction of the vessel's night mate Edward McCafferty. (13a)*

Petitioner testified that it was his duty to look after the safety of the SS. *Parisminia* both with respect to fire and other hazards and to exclude from the ship any persons not authorized to be on board (12a, 13a). Therefore, he had to guard the gangway which led from the dock to the deck of the SS. *Parisminia*. Petitioner admitted that he was not permitted to leave the SS. *Parisminia* unless he had the specific permission of the mate McCafferty, which he did not procure. (13a) He admitted also that his leaving the ship without obtaining this permission was in violation of his duties and the regulations of the Waterfront Commission, for which he could lose his watchman's license. (14a)

Although petitioner in his pleadings alleged that he was attending to his lawful duties while on the Esso Barge, he offered no proof of this allegation on the trial. To the

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* References, unless otherwise specified, are to the respondent's Addendum to its brief.

contrary, he admitted that he had no business or duty on the barge and that he only boarded it on the "invitation" of the barge captain to have a cup of coffee. (10a) The barge captain denied the "invitation" and denied also authority to extend it. (5a) The testimony showed that Esso had issued written instructions which forbade invitations to strangers (5a, 9a) and a large sign located in the midships section of the barge contained the words "No visitors". (5a, 9a) The alleged "invitation" took place in daylight. The sign could be plainly seen from the SS. *Parisminia*. Thus there could not be any apparent authority on the part of the barge captain to extend the "invitation" to petitioner.

Petitioner worked for the Transit Authority from 8 A. M. to 4 P. M. (11a) On May 9 after finishing his work on the subway, he went to his home in Hastings, New York. After spending a few hours at home, he returned to New York City to take up his duties as watchman on the SS. *Parisminia*. (11a) His tour of duty was from 11 P. M. to 7 A. M. (12a)

On May 10 at about 6:30 o'clock in the morning, the Esso Barge #23 was towed alongside the SS. *Parisminia* to bunker it. The barge was not self-propelled but was moved from place to place in the harbor by tugs (Pet.'s App. in the Court of Appeals 9a, 10a). Its crew consisted of 2 men designated by Esso as "captain" and "mate". No officer's license was required. (8a) The "captain", Tollefsen held an A. B. seaman's certificate. (8a) Servilla, who held an ordinary seaman's certificate, was the "mate." (16a) Both men had been employed on Esso barges for a number of years and were experienced workers.

After the barge was placed alongside the vessel, mooring lines were attached to the deck of the SS. *Parisminia*

and made fast on the barge. This was done by putting the loop of the hawsers over bitts on the deck of the ship and then securing them on the barge itself. Thus the mooring lines could be operated only from the barge. (7a)

Thereafter, the bargemen erected an aluminum ladder which had feet at the bottom attached to the side rails of the ladder. The undersurfaces of the feet were made of rubber. Servilla then ascended the ladder and pulled two lashings from the top of the ladder through the rail on the ship and back to the foot of the ladder where Tollefsen made the lashings fast. This permitted the operating of the lashings only from the deck of the barge. (1a, 3a, 4a)

The bargemen then performed additional chores about the deck of the barge in preparation for the pumping of the bunkers. When the chores were completed, the "captain" entered a housing on the stern of the barge which he used as his office, and which also contained a small kitchen. When he entered, he found the petitioner inside drinking milk from a container which petitioner had taken from the barge's refrigerator. (2a) Tollefsen asked the petitioner what he was doing on the barge. The petitioner replied that he wanted some dry coffee beans. (2a, 3a) The captain replied that he had no coffee to give him. However, he allowed petitioner to finish the milk. When petitioner had finished the milk, he left. (3a)

A short time later a noise was heard on deck, and on investigation it was found that petitioner was lying on the deck of the barge near the ladder. (3a) He was attempting to arise from the deck when he was found. He was assisted by the bargeman to a chair. He appeared to have suffered only minor injuries which were satisfactorily treated with two band-aids. (17a, 4a) Petitioner remained on the barge for about 5 minutes and then ascended the ladder without assistance. (17a)

Petitioner contended that the ladder had fallen with him but the bargees testified that the ladder was in the same position as when first erected.

Petitioner was required to submit his time sheet to the mate on the SS. *Parisminia* at quitting time for certification by the mate. Petitioner did so but he did not report having had an accident on the barge. (10a, 14a) He left the SS. *Parisminia* about 7 o'clock in the morning and went directly to his job with the Transit Authority. (14a, 15a) He worked all day and returned that evening to his home in Hastings, where he sought treatment from a Doctor Fabiani. (15a)

Doctor Fabiani prepared a medical report for petitioner's employer (Piership Protective Association) in which he repeated petitioner's description of the cause of his injuries as follows:

> "9. State in patient's own words how the accident occurred:
>
> "While performing deck-patrol duties aboard ship *Parisminia*, scow captain threw me his line at stern and then to go to bow to help fasten ship; in so doing I slipped on either banana skins or grease and fell down hatch to deck below, striking ladder on way down. I was unconscious for 10 minutes. I was given first aid by scow capt. and sent home" (Esso Ex. J.).

The Questions Involved.

The threshold question for decision by the jury was what was petitioner's status on the barge. If he were not lawfully on the barge, irrespective of whether his presence was inimical to the legitimate interests of the owners, he was, as the jury found, a trespasser. Respondent had no

duty except to refrain from willful injury. No claim is made by petitioner that his alleged injuries were due to any willful act on the part of respondent or its agents.

Petitioner's erroneous position is that he had an absolute right, with or without invitation, to board the Esso Barge #23, and that unless he was promptly ejected, his 5 minute stay on the barge crystallized into a right to remain there resulting in a duty on the part of the respondent to avoid negligent injury to him.

With the consent of both parties, questions as to petitioner's status were submitted to the jury on special issues and the jury found in substance that petitioner was a trespasser who boarded the barge for purposes inimical to the legitimate interests of Esso. (Pet.'s App. 49)

Throughout his brief, petitioner charges that he was deprived of a fair trial; the trial judge usurped the function of the jury and, generally, that the trial was "replete with error." A similar charge was made orally (but not in petitioner's briefs) in the Court of Appeals. There was no documentation of the charges, as there is none in the petitioner's present brief. It is not for respondent to argue what action should be taken with respect to the unjustified attack on the integrity of the Trial Judge other than to respectfully suggest that it be ignored for want of truthfulness and support.

POINT I.

THE PETITION IS WITHOUT MERIT. THERE WAS NO ERROR BELOW. THE JURY'S FINDINGS WERE AMPLY SUPPORTED BY THE EVIDENCE.

All the cases cited in Point I of petitioner's brief substantiate respondent's position that since there was no error in the Trial Court and the Court below, the judgments of both courts are not subject to review by this Court.

In *Gibson* v. *Lockheed Aircraft Service*, 350 U. S. 356, this Court exercised its supervisory powers over the lower Federal Courts when it reversed a judgment of the Court of Appeals and reinstated the judgment of the District Court. This action was necessary because there was no error in the Trial Court's instructions and, therefore, the Court of Appeals should not have reversed the District Court's judgment entered on the jury verdict.

In *United States* v. *Atkinson*, 297 U. S. 157, this Court held that, in the absence of exceptional circumstances, error in a jury trial which was not brought to the attention of the Trial Court by proper exception or request to charge, will not be considered on appeal. This is precisely what the Court below found in regard to petitioner's alleged exceptions to the Trial Court's instructions.

It has always been regarded as improvident to grant a writ of certiorari where the only issues raised are those of fact and not of law. The findings of a jury are to be looked upon with the greatest possible weight by a court of review. As was stated by Mr. Justice Stone, speaking for the Court, in *United States* v. *Atkinson* (*supra*) at page 159:

> "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the

trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. *Beaver* v. *Taylor*, 93 U. S. 46; *Allis* v. *United States*, 155 U. S. 117, 122, 123; *United States* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 348; *Pennsylvania R. Co.* v. *Minds*, 250 U. S. 368, 375; *Burns* v. *United States*, 274 U. S. 328, 336; (see *Shannon* v. *Shaffer Oil & Refining Co.*, 51 F. (2d) 878, 880)."

POINT II.

THE TRIAL COURT DID NOT ERR IN ITS SUBMISSION OF THREE QUESTIONS FOR DETERMINATION BY THE JURY IN THE FORM OF A SPECIAL VERDICT.

In the first place, petitioner's counsel consented that the jury first be asked to determine petitioner's status on the barge (Pet.'s App. in the Court of Appeals, 8a, 9a).

The Trial Court said in its charge to the jury:

> "Since you probably have not had experience with special verdicts the Court wants to take this opportunity to emphasize—I am repeating myself here, but I want for emphasis to make sure that you understand—that the submitting of a case for this type of verdict and not a general verdict is not to be construed by you as having any significance whatever. It is just a change in a procedural step which has no bearing at all upon the merits or demerits of this case. The purpose is merely as I indicated to you before we recessed yesterday, to facilitate your deliberations. The Court may require a special verdict. *Both counsel in this case have expressed approval of the program adopted by the court.*" (emphasis supplied)

Rule 49(a) F. R. C. P.[1] provides in part:

> "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact."

The words "each issue of fact" are understood to mean not every issue of fact but ultimate issues of fact.

> "... The second provision of Rule 49(a) calls for 'a written finding upon each issue of fact.' This language is similar to the language used in the statutes of a number of states, particularly of Wisconsin and Texas, where its interpretation has occasioned considerable difficulty. Obviously, the simplest cases may involve many issues of fact; and, if an individual finding is required on each one, the special verdict becomes unwieldy. The courts have, therefore, sought to limit the fact issues submitted to 'ultimate fact issues' in contradistinction to 'evidentiary fact issues.'" Lipscomb, Special Verdicts Under the Federal Rules, 25 Wash. U. L. Q. 185, 189 (1940).

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[1] The text of Rule 49(a) of the F. R. C. P. is as follows: Special Verdicts

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Rule 49(b) provides in part:

> "The court may submit to the jury, together with appropriate forms for a general verdict written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict * * *".

It is left to the trial court's discretion to use either provision and it is free to use neither if the issues in the case are not complex. *Clegg* v. *Hardware Mut. Cas. Co.* 264 F. 2d 152 (C. A. 5th 1959) *Employers Mut. Casualty Co.* v. *Johnson* 201 F. 2d 153, (C. A. 5th 1953).

In the case at bar the Trial Court properly exercised its discretion by applying the provisions of Rule 49 (a) in placing the ultimate issues of fact before the jury. This procedure was more than justified in the light of the complexity of the issues, the length of the trial and the conflicting medical testimony adduced. Moreover, petitioner's counsel consented to the procedure (Pet.'s App. in the Court of Appeals 9a). As the court commented in its charge:

> "* * * the Court felt that there had been so much testimony on the issue of damages and interspersed testimony on the issue of liability that the Court as a matter of discretion concluded that it would aid you in your deliberations if we first disposed of first things" (Pet.'s App. in the Court of Appeals 8a).

The trial lasted from November 23 through December 4 during which 17 witnesses testified. Among these were 4 doctors and a psychologist. Four depositions were read.

The court in its charge went on to caution the jury as follows (Pet.'s App. in the Court of Appeals 8a):

> "You know, it is like 'first things come first'. You don't discuss damages until you find liability.

> But the fact that it is being submitted to you in this way has no significance and you are not to treat it any differently than if it were submitted to you all in one or for a general verdict."

Petitioner despite his consent on the trial, now argues that the procedure followed in the Trial Court deprived him of his right to trial by jury. He may not now voice this objection (F. R. C. P. 51).

As was recently stated in *O'Donnell* v. *Watson Bros. Transportation Co.*, 183 F. Supp. 577 (D. C. N. D. Ill. 1960) page 585:

> "... The right to a trial by jury does not require that all issues be determined by the same jury and severance of the issues is not violative of any constitutional guarantee. Gasoline Products Co. *v.* Champlin Refining Co. 1931, 283 U. S. 494, 51 S. Ct. 513, 75 L. Ed. 1188; Devine *v.* Patteson, 6 Civ., 1957, 242 F. 2d 828, 832-833, Certiorari denied 355 U. S. 821, 78 S. Ct. 27, 2 L. Ed. 2d 36; Washington Gas Light Co. *v.* Connolly, 1954, 94 U. S. App. D. C. 156, 214 F. 2d 254, 256-258; May Department Stores Co. *v.* Bell, 8 Cir., 1932, 61 F. 2d 830, 842-843; Simmons *v.* Fish, 210 Mass. 563, 568, 97 N. E. 102, 104."

Firstly, petitioner agreed to this practice during trial. Now, after the adverse result, he belatedly questions its validity on appeal. Secondly, petitioner waived his right to trial by jury on those issues of fact which he failed to demand be submitted to the jury before it retired. Rule 49 (a); *Merrill* v. *Beaute Vues Corporation*, 235 F. 2d 893, (10 Cir., 1956) *Clegg* v. *Hardware Mut. Cas. Co.* (*supra*). Thirdly, Rule 49 (a) has so remedied the deplorable circumstances surrounding special verdicts at common law that today juries are not burdened with the consideration of unwieldy evidentiary issues of fact but are permitted to

determine the ultimate issues of fact upon which a proper judgment may rest. Driver, "A More Extended Use of the Special Verdict", 9 F. R. D. 495; *Skidmore* v. *Baltimore & O. R. Co.*, 167 F. 2d 54, (CA 2-1948).

Trial by jury is a right subject to reasonable limitation as are all rights guaranteed by the Constitution. Rule 49 (a) is such a reasonable limitation:

> "The command of the Seventh Amendment 'that the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained. Walker *v.* New Mexico & Southern Pacific R. R. Co., 165 U. S. 593, 596. . . . It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." *Ex Parte Peterson* 253 U. S. 300, 309, 310.
>
> See also, Galloway *v.* United States, 319 U. S. 372, 390 (1943); Byrne *v.* Mafezak, 254 F. 2d 525, 529 (3 Cir., 1958), cert denied 358 U. S. 816.

The constitutionality of the special verdict procedure has been settled. *Carr* v. *Beverly Hills Corporation*, 237 F. 2d 323, 325, C. A. 9th (reversed on other grounds, 354 U. S. 917—rehearing denied 355 U. S. 852); *O'Donnell* v. *Watson Brothers Transportation Company*, 183 F. Supp. 577 at page 586, where the court said:

"The authorities universally hold that the District Courts are empowered to order a separate jury trial on the issue of liability as a prerequisite to holding a jury trial on the issue of damages. See United States *v.* Burnett, 9 Cir., 1958, 262 F. 2d 55, 59; Nettles *v.* General Accident Fire & Life Assurance Corp., 5 Cir., 1956, 234 F. 2d 243, 247; Hassett *v.* Modern Maid Packers, Inc., D. C. D. Md. 1959, 23 F. R. D. 661, 664; Lyophile-Cryochem Corp. *v.* Chas. Pfizer & Co., D. C. E. D. N. Y. 1947, 7 F. R. D. 362, 363; Rickenbacher Transportation, Inc. *v.* Pennsylvania R. Co., D. C. S. D. N. Y. 1942, 3 F. R. D. 202, 203, Barron & Holtzoff, Federal Practice & Procedure, §943; 5 Moore, Federal Practice, par. 4203. Determining the order of trial issues is a function reserved to the trial judge, Gross *v.* United States, 9 Cir., 1953, 201 F. 2d 780, 784, and the granting of separate trials of distinct issues is within the sound discretion of the trial judge, Bowie *v.* Sorrell, 4 Cir., 1953, 209 F. 2d 49, 51, 43 A. L. R. 2d 781; see also Bedser *v.* Horton Motor Lines, 4 Cir., 1941, 122 F. 2d 406, 407; Hall Laboratories *v.* National Aluminate Corp., D. C. D. Del. 1951, 95 F. Supp. 323, 326; Eichinger *v.* Fireman's Fund Ins. Co., D. C. D. Neb. 1957, 20 F. R. D. 204; Grissom *v.* Union Pac. R. Co., D. C. D. Colo. 1953, 14 F. R. D. 263, 264; especially where such separation will tend to avoid prejudice, further convenience, promote justice and assure a fair and speedy trial to the litigants. 88 C. J. S. Trial §9a. . . ."

Petitioner presents no authorities for his belated contentions. He ignores *Skidmore* v. *Baltimore & O. R. Co.*, 167 F. 2d 54, (CA 2d) where Judge Frank examined the practice of special verdicts as opposed to general verdicts and strongly recommended special verdicts. Judge Frank fully documented his approval and his colleagues, Judge

Learned Hand and Judge Swan concurred. This opinion is frequently cited and is regarded as a milestone in the practice of trial by special verdict instead of general verdict. One paragraph of Judge Frank's opinion should be persuasive. It appears on page 67 and reads:

> • • • "Accordingly, we cannot hold that a district judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict, although we deem such a verdict usually preferable to the opaque general verdict. Perhaps some day soon Rule 49 will be amended to make compulsory either special verdicts or written interrogatories in civil jury cases. Meanwhile, we can but hope that, in such cases, the district judges will require one or the other, on their own motion or when asked to do so." • • •

It is abundantly clear from the foregoing that the court properly required a special verdict under the Federal Rules of Civil Procedure. The questions were relevant, clear and certainly not prejudicial to petitioner. Special verdicts are the recommended practice. Petitioner's counsel consented to the procedure adopted by the Trial Court and cannot now complain.

POINT III.

THE QUESTIONS SUBMITTED FOR DETERMINATION BY THE JURY ARE MATERIAL AND FREE FROM PREJUDICIAL ERROR. THEY WERE DIRECTED AT ASCERTAINING WHETHER IN FACT PETITIONER HAD MAINTAINED HIS BURDEN OF PROOF AS TO HIS RIGHT TO BE ON THE BARGE.

A.

It is first to be noted that the court charged that petitioner had the burden of proof that he was invited on

board the barge by its captain and that the captain had authority to do so, for purposes other than the furtherance of the legitimate business interests of the owner. (Pet.'s App. in the Court of Appeals 15a) Petitioner took no exception to this charge.

Petitioner offered no proof whatever as to the authority of the barge captain. Petitioner maintains that the bargee, who was in real fact little more than a watchman or deckhand on a dumb barge, had the same status as the master of an ocean going vessel.

The barge captain had no "apparent" authority. A large sign on the barge plainly stated that visitors are not permitted. This was pursuant to a U. S. Coast Guard regulation. (9a, 10a) Moreover, Esso's regulations forbade the bargee to permit visitors aboard. (9a, 5a) Thus the barge captain had no implied authority to invite persons on board the barge.

The captain denied that he extended an invitation and denied that he had the authority to extend one. (5a) Thus an issue was created which would be determined by the jury's response to questions numbered 1 and 2. The real fact is that petitioner came aboard the barge stealthily and was first discovered after he had pilfered a carton of milk from the barge's refrigerator. (2a, 3a) While it is quite true that petitioner was not immediately ordered from the barge he was nonetheless a trespasser. Permission to finish drinking the milk cannot be regarded as a change in petitioner's status. He was on the barge without invitation and for purposes which were inimical to both the barge and its crew. As Servilla testified, the best way to remove an unauthorized person is to treat him politely first and then request him to leave. (17a, 18a)

Moreover, as was fully admitted by the petitioner, vessels carrying petroleum products have hazards (not known

on other vessels) where precautions must be taken against open fires, smoking and the use of improper tools (15a, 16a). The bargees, as required by law, had special certificates as tankermen issued by the United States Coast Guard. (8a, 16a)

Petitioner lays great stress on *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625. The facts of the *Kermarec* case are totally different from those in the case at bar. Kermarec possessed a pass signed by the captain of the ocean-going S/S *Oregon* authorizing him to be on board the vessel. Thus he was an invitee and was visiting a fellow seaman in accordance with custom. Respondent's regulations forbade such practice. Petitioner knew that before one could lawfully board a vessel carrying petroleum products he must have a pass from the owner (15a, 16a).

Thus the *Kermarec* case is not an authority with respect to the case at bar.

The sole duty of Esso to petitioner was to refrain from willful or wanton injury. *Silverado S.S. Co.* v. *Prendergast*, 31 F. 2d 225, 226 (C. A. 9, 1929), cert. denied 280, U. S. 557; *Mistral*, 1932 A. M. C. 762, 767 (W. D. N. Y.); *Nimbus*, 1937 A. M. C. 972 (E. D. N. Y.). The last two cases are not officially reported. Petitioner does not charge that his injuries were the result of willfulness or wantonness.

In the *Silverado* case the Court said, page 226 (31 F. 2d 225):

> • • • "Generally a principal is liable for his agent's torts only if they are committed while the agent is carrying on his principal's business. If the agent steps aside from that business to promote purposes of his own having no connection with his employer's

business, the relation of agency is for the time being and to that extent suspended. And usually it is not within the implied authority of an agent to invite his personal friends to visit, enter upon, or make use of his principal's property; nor is a principal ordinarily liable for injuries suffered by third persons through the negligence of a servant who for purposes of his own has without authority invited, or permitted them to come upon the principal's premises." • • •

B.

Petitioner complained on appeal for the first time that the questions as to negligence were not added to the three questions actually submitted to the jury. He made no such request of the trial judge. He understood thoroughly that such questions would be put later should the jury's response to the three questions require it.

This belated complaint is now repeated in points IV and V of his brief (pp. 24-38). Petitioner charges that both counsel were misled by the Trial Court with respect to the questions which were to be submitted to the jury. His complaint is that only 3 of the 7 questions were actually submitted to the jury, although the court had said that 7 would be submitted.

Petitioner is wrong on all counts. The court carefully instructed counsel that only 3 questions would be first submitted to the jury and that depending on the jury's answers to these 3 questions, further questions would be put. Petitioner's counsel fully appreciated this and, indeed, consented to the action which the court took (Petitioner's App. in Court of Appeals 8a, 9a). The fact that he did not take any exceptions to the submission of only 3 questions is ample evidence that he was fully informed as to what action the court proposed to take. After the jury had rendered its verdict to the effect that petitioner was a trespasser on

Esso's barge with inimical intentions, the petitioner's counsel did not move to set the verdict aside on the ground that more questions should have been submitted to the jury. It is noteworthy that although petitioner's counsel says that he argued to the jury the full 7 questions, he does not include as an appendix to his brief his summation (or final argument) to the jury. He prefers to make the unsubstantiated charge that he was misinformed, or as he puts it "trapped" in the hope that he will be accepted at his word and that this Court will take some action on his word alone, and disregard the trial record. As a matter of fairness to this Court and the Trial Court, whom he unjustifiably belabors, petitioner should state some support for his charges. The Addendum to respondent's brief will demonstrate, without question, the incorrectness of petitioner's charges and statements with respect to the transactions on the trial.

The Court of Appeals stated (Pet.'s App. 51):

> "The inspection we have made [of the entire stenographic transcript] clearly demonstrates that appellant did not object to dividing the jury issue into two parts, nor did he object to dividing the issue of liability into two parts: (1) the status of the plaintiff on board, and (2) the question of negligence if the answer to the status question did not resolve the case. The Trial court made it clear before giving his charge to the jury that he would follow this procedure, and counsel acquiesced, as he did to the submission of the special interrogatories without a general verdict. Furthermore, after the charge was given to the jury, appellant made no objection to the form of the submission."

Once again petitioner failed to comply with Rule 51 of the Rules of Civil Procedure to make known to the court

his objections before the jury retired. His failure to do so bars him from asserting error now.

Blankenship v. *Ellerman's Wilson Line New York, Inc.*, 265 F. 2d 455 cited on page 27 of petitioner's brief is completely irrelevant. There the court failed to instruct the jury concerning the relationship of the questions submitted so that the jury was left in confusion as to whether, although a vessel might have an unseaworthy condition, if plaintiff knew about it, the jury might not find that the unseaworthiness contributed to the accident.

In the case at bar the court clearly instructed the jury that irrespective of the answers which they would give to questions 1 and 2, he nonetheless wished them to answer question #3. This was an explicit instruction which made perfectly clear to the jury that the third question was in no way dependent on the jury's answers to questions 1 and 2. Moreover, even if the jury had answered question #3 in the negative, the court would still have had to grant respondent's motion for a directed verdict (Pet.'s App. 14a in the Court of Appeals).

C.

The final complaint which petitioner makes with respect to the questions is that the court's definition of the word inimical in question #3 was erroneous. The question reads as follows:

> "Was the plaintiff aboard the barge for a purpose inimical to the legitimate interest of her owner?"

The Court of Appeals correctly held that the additional charge to the jury as to the meaning of the word inimical was consistent with its meaning in the main charge to which

petitioner took no exception (Pet.'s App. 56). The Trial Court charged:

> "If you find the plaintiff went there for the purpose of helping himself to some food, whether it be milk or coffee or whatever it was, and that he did so without the captain's consent, you may find that he went there with a purpose inimical to the interest of the captain. In view of the relationship between the captain of the barge and its owner you may conclude from this testimony that the plaintiff had a purpose inimical to the legitimate interests of the owner of the barge."

The additional instruction was necessary because the jury asked the court to clarify the use of the word "inimical" and the phrase "for a purpose". The court gave counsel an opportunity to express views and petitioner's counsel asked the court to charge that the word "inimical" meant "hostile or harmful, and nothing more" (Pet.'s App. in the Court of Appeals 28a). The court instructed the jury that the word meant "inconsistent with" and the phrase "for a purpose" spoke for itself.

The Executive Desk Book published by John J. Winston Company in 1947 defines "inimical" as "unfriendly, opposed, antagonistic". Webster's New Collegiate Dictionary gives it a similar meaning. The word itself is from a Latin word meaning "unfriendly". Its use by the court as "inconsistent with the defendant's legitimate interests" was precise and proper.

The Trial Court correctly denied petitioner's counsel's request to direct the jury that the petitioner was on the barge for purposes not inimical to the interests of the vessel. The verdict of the jury in itself substantiated the

denial of this motion. As held in *Henry W. Cross Co.* v. *Burns*, 81 F. 2d 856 at page 58:

> "In considering the question of the alleged error of the lower court in refusing to direct a verdict in favor of defendant, it will be necessary to refer to the evidence. As to all controverted facts we must assume that the jury determined them in favor of plaintiff, and we must view the evidence in favor of plaintiff's cause of action in the most favorable light, giving to it such favorable inferences as may reasonably be drawn therefrom."

Bernal v. *Baptist Fresh Air Home Society*, 300 N. Y. 486, concerned itself with the duty owing to an infant who, for three years, had been attending a summer camp as a guest and who was injured while performing certain duties in the administration of the camp. The court there held that while plaintiff was a social guest to begin with, during her tenure in the camp she gained the status of a licensee. Here petitioner was not a social guest, nor was he a licensee but, in fact, he was, as the jury correctly found, a trespasser.

Cases such as *Ward* v. *Atlantic Coast Line R. Co.*, 362 U. S. 396; *Butler* v. *Whiteman*, 356 U. S. 271; *Senko* v. *La Crosse Dredging Corp.*, 352 U. S. 370; *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252 and *Petty* v. *Tennessee-Missouri Bridge Comm.*, 359 U. S. 275, concern themselves with the questions whether or not the injured party was an "employee" under the FELA or a "member of the crew" under the Jones Act (46 USC 688).

Respondent readily admits that an objection is sufficient if it is properly made so as to inform the Trial Judge of any possible errors in order that he may have an opportunity to reconsider and correct them if necessary. However, as

the Court below rightly decided, petitioner failed in this respect.

Although Rule 51 does not require formality, the Trial Judge must at least be aware of the objector's position. As expressed in 5, Moore, Federal Practice, at page 2505:

> "• • • (A) mere general objection is insufficient 'where a party might have obtained the correct charge by specifically calling the attention of the Trial Court to the error and where part of the charge was correct' 9. (numerous cases cited)"

In those cases, such as *Sweeney* v. *United Feature Syndicate*, 129 F. 2d 904; *Greyhound Corporation* v. *Blakley*, 262 F. 2d 401; and *Green* v. *Reading Company*, 183 F. 2d 716, the reviewing courts found that the records indicated a sufficient compliance with the rules. Therefore, formal exceptions were held not to be necessary. Such is not the case in the record below.

Petitioner's failure to object to the charge of the court, respecting petitioner's inimical purpose on board the barge, bans him from raising the issue now.

This question, in real fact, was not necessary to a determination of petitioner's right to recover and even if the jury had answered the question in the negative, it could not have changed the result. The first two questions determining that petitioner was on board the barge without an invitation from the captain and that the captain had no authority to extend the invitation, alone, were sufficient for the court to direct judgment in respondent's favor.

POINT IV.

THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL AS TO THE CONSTRUCTION OF RULES 49 AND 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

It is well recognized that it is within the discretion of the trial court whether to utilize the provisions of either Rule 49(a) or 49(b) or neither, depending on the complexity of the issues involved in the case. *Clegg* v. *Hardware Mut. Casualty Co.* 264 F. 2d 152 (5 Cir. 1959) *Employers Mut. Casualty Co.* v. *Johnson,* 201 F. 2d 153 (5 Cir. 1953).

This Court has passed on and approved, as more fully documented in Point II of respondent's brief, the constitutionality of Rule 49 of the Federal Rules of Civil Procedure. It was not necessary for the Trial Court to utilize the provisions of Rule 49(b) since its decision to follow Rule 49(a), which was approved by both counsel, was fully in accord with recognized practice.

Cases cited by petitioner in Point VI of his brief are not relevant to the facts in the case at bar. The action of the Trial Court in submitting the three questions for a special verdict by the jury was clearly proper in the light of the lengthy trial and extensive medical testimony adduced.

Moreover, there was no "piecemeal" submission of the issues in question, nor was petitioner's counsel "trapped" by the charge of the Trial Court. As mentioned earlier, petitioner's counsel felt that "in the main your Honor's thoughts should facilitate matters". Petitioner's counsel may not assert that his acquiescence in the charge of the court resulted in his "entrapment". As stated in *Levin* v. *Joseph E. Seagram & Sons,* 158 F. 2d 55, 58 (7 Cir. 1946) cert. denied 330 U. S. 835:

> "If counsel requests information as to the instructions and is not satisfied with the response of the court, before he can claim prejudice thereby he will have to do more than acquiesce in the court's response which he thinks unsatisfactory. *Dallas Ry. & Terminal Co.* v. *Sullivan*, 5 Cir., 108 F. 2d 581, 583."

Certainly, the various Courts of Appeal are not in conflict as to the construction of Rule 51 of the Federal Rules of Civil Procedure, for as was stated in *Downie* v. *Powers* 193 F. 2d 760, 766 (10 Cir. 1951) "• • • The requirements of Rule 51 are too plain for misunderstanding. • • •"

Petitioner's counsel's alleged exceptions to the charge of the Trial Court are, as the Court below rightfully found, conspicuously absent from the record. If there is anything about which the Courts of Appeal are unanimous, it is that the failure to object to instructions of a trial court, in the absence of fundamental error, precludes a party from raising this issue on appeal. *Downie* v. *Powers*, 193 F. 2d 760 (10 Cir. 1951); *Thorp* v. *American Navigation*, 212 F. 2d 821 (3 Cir. 1954); *McDonald* v. *Jarka Corporation*, 144 F. 2d 53 (2 Cir. 1944); *Greinke* v. *Yellow Cab Co.*, 250 F. 2d 865 (7 Cir. 1958); *Troupe* v. *Chicago, D. & G. Bay Transit Co.*, 234 F. 2d 253 (2 Cir. 1956).

As noted earlier in this brief, petitioner has failed to document his assertion that there is "great confusion and conflict of opinion" among the various Courts of Appeal. His failure to be specific warrants an abrupt dismissal of his charge.

CONCLUSION.

THERE WAS NO ERROR IN THE TRIAL BELOW OR IN THE COURT OF APPEALS. THE SPECIAL VERDICT WAS THE PROPER APPROACH TO THE DETERMINATION OF THE PETITIONER'S LEGAL RIGHT TO RECOVER, PARTICULARLY SINCE BOTH PARTIES AGREED. IT IS THE PROCEDURE RECOMMENDED IN CIVIL JURY TRIALS. THE QUESTIONS THEMSELVES WERE PROPER, CLEAR AND RELEVANT AND WERE GIVEN TO THE JURY UNDER APPROPRIATE INSTRUCTIONS. THE PETITION SHOULD BE DISMISSED.

Respectfully submitted,

WALTER X. CONNOR,
Attorney for Respondent,
Esso Standard Oil Company.

JAMES P. O'NEILL,
Counsel.

ADDENDUM TO BRIEF.

Excerpts from Testimony.

INGVALD TOLLEFSEN, called as a witness by third party defendant, being first duly sworn, testified as follows:

* * * * * *

Direct examination by Mr. Connor:

* * * * * *

(7) Q. Now, when you say you and your partner secured the ladder, what do you mean by that? (8) A. We brought the rope it is hanging on the ladder, we took the two ends with us up, stuck them over the rail of the *Parisminia,* and then back underneath again and down to the bottom again on the small boat, on the barge.

Q. And the purpose of that rope was to secure the ladder? A. Secure the ladder and hold it in place.

By the Court:

Q. Did I understand you to say that when you tied up alongside the *Parisminia* you made fast, then you took this ladder and put it alongside the *Parisminia,* and you and your partner went up this ladder? A. My partner went up and I stood down below.

Q. Your partner went up, and he took the rope which is shown on the picture? A. Yes.

Q. And he made it fast to the— A. He throw it over the rail of the ship, and then we took the ends through there and brought them back to the deck of the barge and made it fast so that the ladder was practically hanging on those two ropes so that it couldn't move. That is the way they all do it on barges.

(9) By Mr. Connor:

Q. What size ropes did you use for that? A. It is a two-inch rope.

Q. You better tell us what two-inch rope is now. A. Well, I guess it means two inches around. It is about the thickness of my three fingers together.

Q. Show us about how thick that would be. A. Well, it would be about between a quarter and a half a dollar size. That is the best I can tell you. It is a three-strand rope.

Q. That would be the diameter of the rope? A. Yes.

Q. And what kind of material was the rope made of? A. Regular manila.

Q. And is manila the kind of rope that is normally used for tying up and securing things? A. It is used for everything, lines and everything.

Q. Now, after you had put the ladder up, where did Mr. Sevilla go? Or did he remain there? A. No. He came down.

Q. Down the ladder? A. Down the ladder and down back on the barge.

(10) Q. And then what happened? A. And then he started to clear up the deck. There is always lines lying coiled up all around and we clear the decks so that we don't get tangled up in it, and we went over there and done that, and then my partner says, "Don't go in, Captain. You do your book work because you have to take care of the log-book" and so forth.

We put everything on a pad and then, when we have a chance, we fill it in in the book.

Q. And did you then go into the cabin? A. Yes.

Q. And when you went into the cabin, what happened, if anything? A. Well, then I saw the watchman was in the cabin.

Q. And what was he doing there? A. He was drinking milk out of a container.

Q. And prior to the time that you saw him with the container of milk, where had the container been? A. In the frigidaire, our frigidaire on the barge.

Q. You have a refrigerator on the barge? A. Yes.

(11) Q. And did you say anything to him? A. Well, I says, "What are you doing here?"

He says he wanted some coffee. I thought he meant a cup of coffee. So I said, "Well, that's in the coffeepot there, if you want a cup."

He says, "No," he wanted dry coffee to take with him.

Q. And then what happened? A. So I asked him what he was going to do there, so he said, well, he was going to go up again.

But I gave him a glass and I said, "You may as well drink that milk up now because you have been drinking out of the container and we don't want to have that."

So he drank up the milk. And in the meantime I sat down at the table and I got a hold of my book and started to do the work.

So he told me he lived in Hastings and he had two jobs, he said, so there wasn't much said; I guess that's about all.

So I said, "You better get upstairs and get on the ship, because that's where you work." So he went out.

Q. What did you do then? (12) A. He went out and went up.

Q. And then what happened after that? A. I told him that my partner was out on deck, so he went out and after a while I hear some footsteps on the deck there, and I hear like a little bang, and of course you hear so much like that on boats, but I got up and I went out, and my partner was over by the rail, and he helped the watchman up.

Q. Where was he? Where was the watchman? A. The watchman was lying on the deck.

Q. Where on the deck? A. At the foot of the ladder, right by the railing. The railing you can see on the pictures there.

* * * * * *

(13) Q. Will you indicate to me where those ropes are that you referred to? We will take the bottom of the ladder first. A. They are made up fast here. You can see it on some of these. The ropes are spliced right into the ladder up here, so if you want to make it fast you throw it over the

rail and then you see how the rope comes down here and here they are, and you make them fast right down here and you can handle the ladder (14) from the barge. You don't have to run up and down.

• • • • • •

(16) Q. And then what was done? A. We lifted him up there. He was all right. So I went in the cabin and took one of the cabin chairs out and let him sit down on the chair.

Q. And did you ask him about what happened to him? A. Yes. I said, "What happened?"

He said he fell off the ladder.

Q. Did you ask him whether he was hurt? A. Yes.

Q. What did he say? A. Well, "Yes." One of his fingers was bleeding a little there, and he had kind of a scratch on his head there. So I put some tape on his finger; it was bleeding.

Q. You mean a band-aid? (17) A. Yes. But I didn't put anything on his head because it was a little scratch.

Q. How big was the scratch you saw on his head? A. I would say about an inch, or a little more. About an inch wide. It was just like a scratch.

Q. Was there any blood coming from it? A. No, but it was red. But there was no blood.

Q. And then what happened? A. Well, I got his name and address and telephone number, and he said he had to get himself up again because he had to relieve the gangway watchman.

I said, "Are you all right?"

So he said, "Yes."

So he went over to the ladder and he walked up himself.

Q. You did not help him up? A. No.

Q. Mr. Sevilla did not help him up? A. No. We stood down and held the ladder.

• • • • • •

Ingvald Tollefsen, for Third Party Defendant—Direct.

Q. And were the ropes on the ladder at that time? (18)
A. Yes, sir.

Q. Had they ever been taken off? A. No, sir.

Q. Now, it has been testified by Mr. Ribiero that after your barge came alongside of the *Parisminia*, you had a conversation with Mr. Ribiero about coming down on the barge. Did you ever have any such conversation? A. No, sir.

Q. Did you ever invite Mr. Ribiero down on the barge? A. No.

Q. Have you any authority to invite people on the barge? A. No, sir.

Mr. Rassner: That is objected to, your Honor. I move the answer be stricken.

The Court: Motion granted.

By Mr. Connor:

Q. Do you have any written instructions with respect to visitors coming on board the ship?

Mr. Rassner: That is objected to, your Honor. Not binding on the plaintiff.

The Court: Overruled.

(19) A. Yes, sir.

Q. And do you keep a copy of those orders on your vessel? A. Yes, sir.

Q. In addition to that, do you have any signs on your vessel about visitors? A. Yes. We have a sign about midships.

Q. That is about the middle of the ship? A. About the middle of the boat, yes.

Q. What does it say on the sign? A. It says, "No smoking, no open fires, and no visitors."

Q. Are open fires or smoking dangerous on the kind of a vessel that you were on, that barge? A. Well, it could be.

Q. What do you mean, "it could be"? A. Well, I suppose there would be fumes enough in there, gas, especially if the oil is hot.

Q. Well, what would happen if you had fumes and you had an open flame? A. Well, it could explode. That is why we are not allowed to smoke anywheres outside.

Q. Would it blow the ship up? A. Well, it could.

(20) Q. It could also blow up the ship that you were tied to? A. Well, I don't think it would be that bad, but it could happen.

Q. Have you ever been on a ship that was in an explosion? A. No, but I have seen it.

Q. And you have seen vessels which have had explosions? A. Yes, but there has been different oil. There has been gasoline. But this is the way the Coast Guard gives you the signs and everything.

Q. The Coast Guard has some regulation about it? A. Yes.

• • • • • •

(22) Q. Now, when you came out on deck after you heard the running feet, what was the position of the ladder at that time? A. After I came out on deck?

Q. Yes. A. It was in the same position that it was before.

Q. Were the ropes still tied to it? A. Yes.

• • • • • •

(23) Q. Do you know how Mr. Ribiero got down on the deck of the barge? A. No. He must have come down on the ladder.

Q. You think he did; is that it? A. Yes.

Q. You did not see him? Q. No, I didn't see him.

Q. The first time you saw him on the barge was when you saw him drinking out of the carton of milk; is that right? A. That's right.

• • • • • •

Ingvald Tollefsen, for Third Party Defendant—Cross.

Cross-examination by Mr. Rassner:

• • • • • •

Q. You don't send a man up to the *Parisminia* to watch the lines on the *Parisminia*, do you? A. No, sir.

Q. Whose job is that, to watch the lines on the *Parisminia*? A. Nobody watches the line.

Q. All right. That is your testimony: nobody watches it. A. That's right.

By the Court:

Q. Tell us what it means to watch lines. A. I don't know what he means. But he must mean take slack in, you know, tighten them up if it is too much, or if they get too tight——

Q. Is there any way of taking the slack in up on top? A. No.

Q. You can't take it in? A. No, there is nothing there. It is just spliced, a small eye in there.

• • • • • •

(42) Q. There is an eye on the end of the hawser which goes up on the *Parisminia*? A. That is right.

Q. That can't be slackened, it can't be tightened on the *Parisminia*? A. No.

Q. Somebody must go down on the barge or be on the barge to loosen or slacken the line as needed, isn't that so? A. Yes.

Q. That's got to be done on the barge? A. On the barge, yes.

• • • • • •

(43) By the Court:

Q. Who takes care of the lines on the barge? A. We do, the crew on the barge takes care of the lines and nobody else is supposed to come down and touch no lines.

Q. Do they come down? A. No, nobody comes down.

Q. That is your job? A. That is all.

Q. Do they ever come down? A. No, sir.

Q. Did they come down on this day? A. No, sir.

(44) Q. Would they have any business on your vessel? A. No, sir.

(64) By the Court:

Q. Had the ladder fallen on top of him, too? A. No. the ladder was still there.

Q. Had the ladder moved in any way? A. No, I didn't notice that it moved anywheres.

(68) *Re-direct examination by Mr. Connor:*

Q. I just want to ask you one or two questions, Captain. I forgot to ask you before. Do you have (69) any master's license issued by the United States Coast Guard? A. No, sir.

Q. Do you have any chief officer's license? A. No, sir.

Q. Do you have any kind of a document issued by the United States Coast Guard? A. Yes.

Q. What kind of document is that? A. I have an AB seaman for any ocean, and I also have lifeboat ticket, and I have tanker license, to operate petroleum boats, that carries petroleum, oil boats.

Q. In other words, you have a certificate from the United States Coast Guard? A. Yes, sir.

Q. Which permits you to go to sea as a sailor aboard a ship? A. Any ship, any ocean.

Q. And then you have what you call a lifeboat ticket, which certifies that you are competent to handle a lifeboat? A. That's right.

Q. And then you have an endorsement on your sea-(70) man's certificate saying that you are qualified to sail on vessels carrying petroleum products? A. Yes, sir.

Amedeo Giallorenzi, for Third Party Defendant—Direct.

AMEDEO GIALLORENZI, called as a witness by third party defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Connor:

* * * * * *

(86) Q. The question was: Are barge captains permitted to invite persons on board the barges for social reasons? A. No, sir.

Q. For example, is the captain permitted to invite a watchman from another ship to board the barge for the purpose of giving him milk or coffee? A. No, sir, no one.

* * * * * *

(89) Q. And can you tell us whether or not the Esso barge 23 has any sign on it with respect to visitors?

* * * * * *

A. Yes, sir. The 23 and all of our company barges are so posted. In fact, all tank barges in the industry are posted, and that is—all tank barges are under the supervision and inspection of the United States Coast Guard, Marine Inspection, and one of the requirements is th[illegible]ach tank barge—all tank barges are to be posted with a sign stating "No smoking, no fires and no visitors." And all of our equipment which is inspected periodically by the Coast Guard is (90) so equipped.

Q. And is there any additional hazard on an oil barge as compared with barges that carry gravel and bricks and so on? A. Well, I think the nature of the cargo itself might answer that question.

Q. Maybe it does, but is it a hazard or isn't it? A. Yes, definitely.

Q. And do you know whether or not the fact that such cargo does present a hazard on oil barges is one of the reasons why you prohibit the barge captains from having social visitors on board? A. Exactly. I mean, the inherent dangers in handling of petroleum products is the reason for

the Coast Guard's requirement that visitors who might be unacquainted and unaccustomed to handling petroleum products be excluded.

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JOAQUIM RIBIERO, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination by Mr. Rassner:

• • • • • •

(269) Q. Did you have a conversation with the captain of the barge? A. Yes.

Q. What did you say to him and what did he say to you? A. He said "You feel cold? You want to come down and get a cup of coffee?"

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(273) Q. How did you get off the barge and go home? Tell us how you did that. A. I climbed the ladder. The captain hold the ladder for me.

Q. Go ahead. A. When he finished the bandage, pick it up to me.

Q. Go ahead. Then what did you do? A. I tell the night mate. He say my work finished, so all right I go home.

Q. Did you tell the night mate you had an accident? A. No.

Q. You left the *Parisminia* and you went home, is that right? A. That's right, yes.

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(300) *Cross examination by Mr. Hampton:*

Q. As I understand, Mr. Ribiero, on the 9th day of May 1955 you worked for the Transportation System as a maintenance man, is that right? A. That's right.

Q. And what time of the day on May 9, 1955 did you go to work as a maintenance man for the Transportation System? A. Yes.

Q. What time of day? A. Eight to four, eight o'clock in the morning to—eight to four.

Q. So you got to the job at eight o'clock in the morning, your job as a maintenance man for the (301) Transportation Department, eight o'clock in the morning of May 9, 1955, is that right? A. Yes.

Q. How did you get to the job that day from your home in Hastings? A. I get off the job, the IRT, four o'clock.

Q. How did you get to the job from your home in Hastings? How did you travel to your job that day, that morning? A. I travel with the subway.

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(302) Q. And when you got home how did you find out about a job that you had to go to that night as a watchman? A. My wife say, "Call Mr. Phillips, Pier 92. He say got a job for you."

Q. Did you call Mr. Phillips? A. Yes.

Q. And as a result of the call or the telephone conversation you had with Mr. Phillips you found out that you had to report to work at Pier 7, North River that night, is that right? A. Yes, yes.

Q. What time on the evening of May 9, 1955 did you leave your home? A. Yes.

Q. What time did you leave your home to get to (303) the job as a watchman? A. Ten o'clock.

Q. And how did you travel from your home in Hastings down to the job that night? A. With a bus. The bus, get a subway. I get off at Bowling Green.

Q. And then when you got off at Bowling Green you walk over to Pier 5, as I understand it— A. That's right, get a pass.

Q. —and you got a pass. And then, after you got your pass you walked up to Pier 7. A. That's right.

Q. And you went onto Pier 7 where the *Parisminia* was berthed, is that right? A. That's right.

Q. And you boarded the vessel by means of a gangplank, from the pier to a vessel, is that right? A. That's right.

Joaquim Ribeiro, Plaintiff—Cross.

Q. When you got to the *Parisminia* how many gangplanks did you observe— A. One.

Q. —from the pier to the *Parisminia?* A. Just one gangway.

Q. And this was the only gangplank from the pier (304) to the boat by means of which you got to your job as a watchman on board that vessel, is that right? A. That's right.

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(311) Q. And, of course, being a union member, as a watchman there are certain rules and regulations that you observe as required under the union in which you belong as a watchman, isn't that so? A. Yes.

Q. And these union rules define your duties as a watchman when you are performing those duties on board a vessel, isn't that so? A. Yes.

Q. And you always, when you are watching on a vessel as a watchman, observe those union rules and regulations, isn't that so? A. Yes.

Q. One of your duties as a watchman, is it not, is to protect the gangplank, and by that I mean to insure or to make certain that people who have no business on board (312) that vessel do not board that vessel; isn't that right? A. Yes.

Q. And during your watch between 11 o'clock at night or 12 o'clock at night to 7 o'clock the following morning you are constantly patroling the various decks on board that vessel; isn't that right? A. That's right.

Q. And you are also constantly watching and looking at the gangplank to make certain that people do not get on that boat; isn't that so? A. That's right.

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(313) Q. When he asked you about mate, do you know what mate he talked to you about? A. My boss, the night mate.

Q. Your boss on the *Parisminia.* A. That's right.

(314) The Court: All right.

Joaquim Ribiero, Plaintiff—Cross.

By Mr. Hampton:

Q. With respect to your job where you are on duty patroling the various decks and watching the gangplank, is it not a fact, Mr. Ribiero, that under no circumstances are you permitted to leave your post or leave your vessel or leave the boat? Isn't that right? A. That's right.

Q. And if you did for any reason or on any occasion have to leave the vessel you would first have to report to your boss, as you speak of him, the night mate, and get permission from him before you could leave the vessel, isn't that so? A. That's right.

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(334) Q. Did you see the mate of the vessel *Parisminia* whom you call your boss before you went down to get coffee? A. No.

(335) Q. He didn't even know you went down to get coffee, did he? A. No.

Q. As I understand it, your job as a watchman aboard a vessel is for the security of the vessel against fire, against theft, isn't that so? A. That's right, yes.

Q. Your job is an important one in that respect, isn't that right? A. Yes.

Q. Your job might mean the saving of lives and property, isn't that right? Isn't that right? A. That's right, yes.

Q. And you went down to the barge for a cup of coffee and you left your post, didn't you? You left the boat, didn't you? A. Yes.

Q. You left your tour of duty; you left your post, didn't you? Didn't you? A. Yes.

Q. And how long were you down on that barge with the captain? A. I get a cup of coffee in the galley. I stayed five minutes.

(336) Q. And for five minutes in the galley of that barge there that vessel *Parisminia* was left unprotected, wasn't it? Wasn't it? A. Yes.

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(340) Q. And since it was about quitting time, the first thing you did then was to go and see the mate of the vessel *Parisminia* so that he could sign you off, is that right? A. That's right.

Q. And you saw the mate and you were signed off by him? A. Yes. He say O. K.

Q. And you never told the mate of the *Parisminia* about this accident you had on the barge, did you? A. No.

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Q. You know as a watchman licensed by the Waterfront Commission that it is a violation to leave your post while you are on duty, isn't that so? (341) A. Yes.

Q. Isn't that right? A. That's right.

Q. And for that violation your license could be lifted. You knew that, didn't you? A. Yes.

Q. And if you told the mate that you were off that boat for a period of time that mate could make a complaint which would cause you to lose your license, isn't that right? A. Right.

Q. Isn't that right? A. Yes

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(348) Q. After you had gotten your discharge for your day's work from the night mate of the *Parisminia*, then you left the boat; isn't that right? A. That's right.

Q. And you left the boat on the same gangplank which was located at the starboard side of the *Parisminia* to Pier 7 that you went on the boat; isn't that so? A. Yes.

Q. That same gangplank. A. Yes.

Q. That gangplank that was there for you and others to use to get on and leave the boat; isn't that right? A. All the time, yes.

Q. What? A. All the time.

Q. And from Pier 7, then where did you go? A. I go home.

Q. To Hastings? A. I go to work.

Joaquim Ribiero, Plaintiff—Cross.

Q. You went home to Hastings. A. No, I go to work, IRT.

Q. You went home first? A. No.

. . . . . .

(356) Q. Did you go to work at all on May 12th? A. Yes.

Q. Well, if you saw the doctor on May 11th, did he treat your back for you? A. He send me in General Hospital, Dr. Fabiani.

Q. Did you tell Dr. Fabiani about your back? A. Yes.

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Cross-examination by Mr. Connor:

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(410) Q. Did you ever work on an oil tanker? A. Yes.

Q. And from your experience working on an oil tanker, is it necessary to be careful of what you do so that you don't cause fires on a vessel carrying oil? A. Yes.

Q. You have to be careful about smoking, don't you? A. Yes, stop smoke.

Q. And you have to be careful about not having — A. Right.

Q. —any open lights, right? A. Yes.

Q. And you also have to be careful about the kind of tools you use on a tanker, don't you? A. Yes.

Q. Did you ever hear of non-sparking tools? A. Yes.

. . . . . .

(411) Q. There is always a great danger that the barge or the oil tanker might blow up, isn't that true? A. Yes.

. . . . . .

Q. When you were working on a tanker, even back thirty years ago, wasn't it the practice of the company not to allow people on board the big oil tanker unless they had a pass?

Mr. Rassner: That is objected to, particularly in view of the invitation.

The Court: Objection overruled.

Q. So you know that it is the practice on oil ships (412) that before one goes on the ship he should have a pass of some kind; isn't that so?

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Q. Isn't that so? A. Yes.

Q. And you knew that before you went down on the barge, didn't you?

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Q. Isn't that so? You did know that. A. Yes, I know.

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(441) STEPHEN SEVILLA, called as a witness on behalf of the defendant Esso Standard Oil Company, having been first duly sworn, testified as follows:

Direct examination by Mr. Connor:

Q. Mr. Sevilla, by whom are you employed? A. When I was employed?

Q. No. By whom are you employed? A. By the Esso Oil Company.

Q. And what is your job? A. I was a third mate.

Q. Do you have any license issued by the United States Coast Guard? A. Yes, I have.

Q. What have you got? A. I got a tanker man ticket and a lifeboat ticket.

Q. A tanker man's ticket and a lifeboat ticket? A. Yes.

Q. And a tanker man's ticket, as I understand it, permits you to sail on vessels carrying petroleum products. A. That's right.

By the Court:

Q. Are you also an able bodied seaman? A. No, I haven't got that.

Q. You haven't got that? (442) A. No.

Q. Do you have an ordinary seaman's certificate? A. Ordinary seaman I have.

Stephen Sevilla, for Defendant—Re-direct.

Q. You have ordinary seaman but not able bodied seaman. A. That's right.

Q. AB is higher than OS? A. That's right.

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(452) Q. Did you remain with the captain while he talked to Mr. Ribiero as he sat in the chair? A. He brought the chair out. I stayed a little while there until he bandaged his finger. I noticed his right thumb was bleeding. So the captain went in—I don't know whether he got iodine or alcohol, but he put something on it. He put a band-aid on his right thumb.

Q. Did you notice anything else about him? A. No, I didn't.

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(455) Q. And did you watch him go up the ladder? A. Yes, he went right up the ladder just like an ordinary man would do.

Q. Aside from this one time that you tied the ladder up, do you have occasion to go up and down the ladder with your barge up against a ship? A. Going up the ladder?

Q. Yes. A. Oh, yes, we go up, call up, report to the boat what time we think it will be finished and give them an idea just what's what, give the company an idea.

Q. That is so a tug can come and take you away? A. Correct.

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Re-direct examination by Mr. Connor:

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(507) Q. In connection with unauthorized persons coming aboard the ship such as the way you were tied up that day against the *Parisminia*, suppose a man comes down on the deck of the ship and you see him and you say, "Well, get off the ship" and he says "No, I won't." What do you do about it? Do you carry him up the ladder? A. No, I would ask him in a nice way. "Look," I say, "what do you want

in the first place?'' I would inquire first what he want. And if he ain't got no business on the ship—because sometimes we have repairmen come down to repair the Frigidaire or dynamo or engines or something, and if he ain't got no business on the boat then I ask him in a nice way to get off the barge.

Q. And do you find that asking him in a nice way and treating him like a gentleman is the easiest (508) way to get him off the barge? A. That is the only way.

Mr. Rassner: I object to that. That is going far afield.

The Court: Objection overruled.

Q. Did you answer that question?

The Court: Yes. He said that is the easiest way.

The Witness: That is the best way to get anybody off.

The Court: He has found being a gentleman is the best way to get along in this world.

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EXCEPTIONS TO THE CHARGE.

(535) Mr. Rassner: Plaintiff takes exceptions to your Honor submitting questions 1 and 2 to the jury on the ground that neither question is a proper question in the case at bar. They are irrelevant, immaterial and outside the issues in this case.

The plaintiff takes exception to so much of his Honor's charge as makes a distinction between the (536) captain and mate on the barge and the captain and mate on a merchant vessel.

The plaintiff takes exception to so much of the Court's charge as comments on the fact that there is a question in the case of more than one ladder.

Plaintiff takes exception to so much of the Court's charge as comments on the written instructions on the

Exceptions to the Charge.

ground that it is error to accept or receive into evidence any evidence relating to written instructions by the owner to the master of the vessel.

Plaintiff takes exception to so much of the Court's charge as speaks of the Coast Guard regulations or any matters relating to the Coast Guard as any evidence received bearing on that question was erroneously received.

Plaintiff takes exception to so much of the Court's charge as makes comment—this has particular reference to question No. 3—on the conversation had by the plaintiff and the captain of the barge before the plaintiff entered the galley on the barge, particularly in view of the fact that the conversation relating to the plaintiff's home life and business has been omitted; furthermore, that any conversation that took place before there was this absolute change of (.37) status, if it did not exist in the first instance, of an invitee to the barge, the fact that the master went into a social conversation and did offer refreshments, be it with milk or coffee, in his quarters, changed the status, if there were a change necessary, of the plaintiff from whatever status it might have been to that of an invited guest.

Plaintiff takes exception to so much of the Court's charge as states that the plaintiff had no witness to support his contention as to the manner of the happening of the accident or any other.

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(539) The Court: It isn't a question of whether you are right or wrong. I am not determining whether you are right or wrong. I am trying to get what you want to raise because, if I did err, I want to have an opportunity to correct that.

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Mr. Rassner: He slipped from the ladder.

(541) The Court: All right, there is no question about that. I am not submitting that issue. That is on the question of negligence. That comes later. I am not submitting

that to them at this time. The only issues are these issues now: Was he an invitee? Did the captain have authority? Was it or was it not for a purpose inimical to the legitimate interests of the owners? Those are the only issues.

Mr. Rassner: I have made my objections on the (542) record. Now I have one more: that there be a direction as to the third question and a direction that the plaintiff was aboard barge 23 for purposes not inimical to the interests of the barge owner as there is no dispute that he was there for purposes not inimical to the interests of the vessel.

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COLLOQUY BEFORE CHARGE.

(562) Mr. Connor: Do I understand your Honor is going to limit our summations to the matter of liability?

(563) The Court: The summations at this time are to be limited to matters of liability because, as the Court previously indicated, the matter will be submitted to the jury on special issues. The first special issues will deal only with the subject of liability and if the verdict returned by them indicates they find there is liability, then we will go into damages.

The Court feels it is a matter of discretion, and in the interests of having an orderly trial and an intelligent verdict, in view of the disproportionate length of time taken on proof of damages and the relatively shorter time taken on the question of liability, that it is indicated here, in the interests of justice to both sides, not to have a general verdict but to have a special verdict in two parts.

The first questions to be submitted to them, and you will confine your summation, gentlemen, to that, is, first, did the Captain of Esso Barge No. 23 invite the plaintiff aboard the barge? Second, if your answer to the first question is yes, next question: Was the invitation extended with the authority and consent of the owner of the barge?

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